IN THE COURT OF APPEALS OF IOWA

No. 3-1002 / 12-2270
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEMETRICE DE ANGELO TOMPKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, District Associate Judge.

Defendant appeals his conviction for domestic abuse assault causing injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jeremy Westendorf, Assistant County Attorney, for appellee.

Considered by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

DANILSON, C.J.

Demetrice Tompkins appeals his conviction for domestic abuse assault causing injury in violation of Iowa Code section 708.2A(2)(b) (2011). On appeal, he maintains he received ineffective assistance of trial counsel. He contends counsel failed to object to witness testimony under the Confrontation Clause of the Sixth Amendment and failed to object to testimony as hearsay. He asserts he was prejudiced by the cumulative effect of counsel's errors and asks that we remand for a new trial. Because we conclude trial counsel did not provide ineffective assistance, we affirm.

I. Background Facts and Proceedings.

Adriana Hanson was in a relationship with and lived with Tompkins on June 18, 2012. That day, Officer Kyle Jurgensen of the Waterloo Police Department was dispatched to the couple's apartment complex for a domestic dispute. A neighbor had called dispatch to report that Hanson said Tompkins assaulted her. Officer Jurgensen testified that when he arrived at the complex, Tompkins was shouting derogatory slurs at Hanson in front of the apartment building. Officer Jurgensen separated the parties and attempted to calm Tompkins down. Sometime later, the officer placed Tompkins in the back of the squad car. Officer Jurgensen then approached Hanson and asked her what had happened. She told him Tompkins had pushed her down on the concrete outside the apartment. Officer Jurgensen took photographs of the resulting injuries—scrapes on her left elbow and knee—and her broken glasses.

Tompkins denied pushing Hanson. He claimed she fell on some glass and hurt herself.

While Officer Jurgensen transported Tompkins to the police station, Tompkins was aggressive and verbally assaultive. Attempting to negotiate, he agreed to take a breath test if Officer Jurgensen did not charge him with domestic abuse. When Officer Jurgensen declined the offer, Tompkins refused the breath test.

On July 9, 2012, Tompkins was charged with domestic abuse assault causing injury and public intoxication (second offense). Prior to the commencement of trial, he pled guilty to public intoxication.[1]

Tompkins also filed a motion in limine prior to trial seeking to preclude the testimony of Hanson. The motion contended the State would be trying to call Hanson as a witness "to put inadmissible hearsay (her prior statements) in front of the jury under the guise of impeachment" contrary to the principles established in *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990). Ultimately, the court's oral in limine ruling permitted the State to examine the witness only in connection with the domestic relationship between the alleged victim and Tompkins. Officer Jurgensen offered all testimony about the night in question over hearsay objections from Tompkins' counsel. The jury returned a guilty verdict on October 25, 2012.

On December 11, 2012, Tompkins was sentenced to 365 days in jail with all but four suspended, placed on probation, and fined $315. He appeals.

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[1] Tompkins does not challenge the public intoxication conviction on appeal.

II. Standard of Review.

A defendant need not, but may raise an ineffective-assistance-of-counsel claim on direct appeal if the defendant has reasonable grounds to believe the record is adequate to address the claim on direct appeal. *State v. Straw*, 709 N.W. 2d 128, 133 (Iowa 2006). If we determine the record is adequate, we may decide the claim. *Id*. However, generally we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave such claims for postconviction relief proceedings, so an adequate record of the claim can be developed. *Id*. For the reasons that follow, we find the record on direct appeal sufficient to resolve the issues in the present case.

We review claims of ineffective assistance of counsel, which have their basis in the Sixth Amendment to the United States Constitution, de novo. *State v*. *Clay*, 824 N.W.2d 488, 494 (Iowa 2012).

III. Discussion.

On appeal, Tompkins maintains counsel was ineffective for failing to object to the officer's testimony under the Confrontation Clause of the Sixth Amendment and for failing to object and move to strike unsolicited testimony as hearsay.

To succeed on his ineffectiveness claim, Tompkins must show by a preponderance of the evidence that (1) his counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). To prove that counsel failed to perform an essential duty, the

defendant must show "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In doing so, he must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. Prejudice has resulted when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). We need not address both prongs if the defendant makes an insufficient showing on one prong. *See Everett v. State*, 789 N.W.2d 151, 159 (Iowa 2010).

A. Confrontation Clause.

The Sixth Amendment to the United States Constitution includes what is described as the Confrontation Clause: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The clause bars "admission of testimonial statements of a witness who did not appear at trial unless [s]he was unavailable to testify, and the defendant had had a prior opportunity for cross examination." *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). As aptly summarized by our supreme court:

> An out-of-court statement by a witness that is testimonial in nature is barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. This prohibition applies even though the out-of-court statement is deemed reliable by the court. Nontestimonial statements are not subject to scrutiny under the Confrontation Clause.

State v. Musser, 721 N.W.2d 734, 753 (Iowa 2006) (internal citations omitted).

On appeal, Tompkins contends he was prejudiced by Officer Jurgensen's testimony offered by the State in violation of the Confrontation Clause. He does not make a separate state constitutional claim. He maintains counsel was ineffective for failing to object to the statements in question, namely testimony offered by Officer Jurgensen that Hanson told him her injuries were a result of Tompkins pushing her down during their fight. At trial, Tompkins counsel did make a hearsay objection to the testimony. Outside the presence of the jury, the court heard further foundational testimony and ruled the testimony was admissible under the excited utterance exception to the hearsay rule. *See* Iowa R. Evid. 5.803(2). Tompkins does not challenge this ruling on appeal. However, the admissibility of the statements as excited utterances under state evidentiary rules does not resolve the issue of whether Tompkins' attorney should have also objected on the basis of the Confrontation Clause.

The State disagrees that the statements were testimonial in nature, but if testimonial, the State argues Tompkins was not denied his right to confrontation because Hanson was available. The State bears the burden of proving by a preponderance of the evidence that a challenged hearsay statement is nontestimonial. *State v. Schaer*, 757 N.W.2d 630, 635 (Iowa 2008).

1. Testimonial Statements.

The United States Supreme Court has differentiated when a statement is testimonial or nontestimonial. A statement is nontestimonial "when made in the course of police interrogation under circumstances objectively indicating the primary purpose of interrogation is to enable police assistance to meet an

ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822 (2006). In contrast, a statement is testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*. In *Davis*, the Supreme Court determined that statements made by the victim to a 911 operator were nontestimonial because the caller was neither acting as a witness nor testifying, but rather describing events as they were occurring during an ongoing emergency. *Id*. at 827.

In contrast, in the *Hammon v*. *Indiana* case that was resolved with *Davis*, the police responded to a reported domestic disturbance. *See id*. at 819. When the officers arrived at the home, they found the victim alone on the front porch. *Id*. She told the officers "nothing was the matter" and gave them permission to enter the home. *Id*. The officers asked her "what had occurred," and she reported the defendant had assaulted her by hitting her and shoving her down. *Id*. The Supreme Court determined these statements were testimonial in nature because, although it was not particularly formal, the victim was "separated from the defendant," she "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed," and the statements "took place some time after the events described were over." *Id*. at 830.

We find the present facts more analogous to those in *Hammon*. Officer Jurgensen responded to a neighbor's call reporting a domestic dispute. Hanson did not initiate the contact with law enforcement but did request the neighbor make the call. Although Tompkins was still yelling at Hanson when Officer

Jurgensen arrived, he separated the two parties, placing Tompkins in the back of the squad car. After placing Tompkins in the squad car, the officer approached Hanson and asked her "what was going on." In response, she told him that Tompkins had pushed her down during a fight. She then showed him the injuries she had sustained. The emergency was not ongoing at the time Hanson answered the officer's question, as Tompkins had already been restrained in the back of the squad car. Also, Hanson was not reporting any action currently occurring, but rather answering a question asked by Officer Jurgensen "to establish or prove past events potentially relevant to later criminal prosecution." *See id*. at 822. Thus, we conclude the State has failed to meet its burden—the statements made by Hanson were testimonial.

2. Availability for Cross-Examination.

The State argues that even if the statements Hanson made to Officer Jurgensen were testimonial, Tompkins was not denied his right to confront the witness as the witness was available for cross-examination. As the United States Supreme Court stated in *Crawford*, the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial." 541 U.S. at 53–54. In this case, it is undisputed that Hanson did appear and testify at trial. Although her testimony was limited to establishing the domestic relationship between herself and Tompkins, the limitation was a result of Tompkins' successful motion in limine.

Tompkins' motion in limine sought to preclude any testimony from Hanson on the basis that the State only sought to call her as a witness "to put

inadmissible hearsay (her prior statements) in front of the jury under the guise of impeachment." Tompkins contended the State may not "place a witness on the stand that is expected to give unfavorable testimony and then offer evidence which is otherwise inadmissible," citing *Turecek*, 456 N.W.2d at 225. The State argued it was not calling Hanson to the stand solely to impeach her with her prior statements, but nonetheless agreed to limit Hanson's testimony to the existence of a domestic relationship, and the court ruled consistent with this agreement.

Here, the State both made Hanson available for trial and Hanson testified at trial. We acknowledge that neither the State nor Tompkins examined Hanson about her statements to Officer Jurgensen on the night of Tompkins' arrest. In fact, Tompkins' attorney did not cross-examine Hanson on any facts. However, we note the in limine ruling only prohibited the State from examining Hanson on her prior statements. Tompkins' attorney was not similarly restricted, and we need not speculate whether any such questions would have been subject to an objection. Rather, we find persuasive the conclusion reached by one court, "[w]here a defendant does not attempt to cross-examine a witness on her out-of-court statements, he cannot complain that the witness was unavailable for cross-examination." *People v. Garcia-Cordova*, 963 N.E.2d 355, 370 (Ill. App. Ct. 2011) (citation omitted). The conclusion is consistent with the United States Supreme Court's definition of being "subject to cross-examination":

> Ordinarily a witness is regarded as "subject to cross-examination" when he is placed on the stand, under oath, and responds willingly to questions. Just as with the constitutional prohibition, limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a

> degree that meaningful cross-examination within the intent of the Rule no longer exists.

United States v. Owens, 484 U.S. 554, 561–62 (1988). The Colorado Supreme Court reported a compilation of case law on the issue of whether a tactical decision not to cross-examine a witness constitutes a denial of the right to confrontation and concluded:

> The right to confrontation is not denied simply because the prosecution is permitted to examine a witness whom the defense declines for tactical reasons to cross-examine. *See United States v*. *Cree*, 778 F.2d 474, 479 (8th Cir. 1985) (no Confrontation Clause violation when defense counsel failed to seek pretrial ruling on four-year-old complainant's ability to testify and declined, for tactical or other considerations, to call complainant as a witness); *United States v*. *Farnsworth*, 729 F.2d 1158, 1162 (8th Cir. 1984) (finding no Confrontation Clause violation when the defendant's counsel made a strategic decision not to cross-examine parole officers about an identification because of the danger of revealing prior convictions); *United States v*. *Howard*, 751 F.2d 336, 338 (10th Cir. 1984) (finding that the defendant's Sixth Amendment right to confrontation is not denied when the defense counsel is given the opportunity to cross-examine witness on points he considered prejudicial to his client, but for tactical reasons declined to do so), *cert*. *denied*, (1985); *United States v*. *Hines*, 696 F.2d 722, 731 (10th Cir. 1982) (same); *United States v*. *Gibbs*, 662 F.2d 728, 730–31 (11th Cir. 1981) (concluding that counsel's failure to cross-examine witness or bring out specific evidence was a tactical decision).

People v. *Dist*. *Ct*., 869 P.2d 1281, 1287-88 (Colo. 1994). Here, Tompkins had the "opportunity" for meaningful cross-examination and cannot now complain that Hanson was unavailable simply because Tompkins chose not to cross-examine Hanson for tactical reasons. We decline to decide if Tompkins' attorney was ineffective for failing to cross-examine Hanson on her prior statements (or the result of the attorney's trial strategy), as that issue has not been raised on appeal.

Because Hanson was available for cross-examination by Tompkins, any objection by counsel under the Confrontation Clause would have been denied by the court. Tompkins' attorney had "no duty to pursue a meritless issue," and no essential duty was breached. *See State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011). Accordingly, we need not address the prejudice element of ineffective assistance. *See Everett*, 789 N.W.2d at 159.

B. Hearsay Objection.

Tompkins also contends counsel was ineffective for failing to make a hearsay objection to testimony offered by Officer Jurgensen that a witness told him Tompkins pushed Hanson during their altercation. His claim is based on testimony provided during cross-examination by defense counsel:

> Q: Officer Jurgensen, when you arrived at the scene on Pine View Place, at Pine View Place, the apartments there, were the only two people present Mr. Tompkins and Ms. Hanson? A: No.
>
> Q: And there were four or five people there? A: Yes.
>
> Q: So is it possible that those injuries could have been inflicted by any one of those people? A: No.
>
> Q: It's not possible? A: No. I had one person there tell me he [Tompkins] had pushed her, but due to her [the unnamed witness's] intoxication level and her unwillingness to cooperate with police, she wasn't mentioned in any reports or anything, so—
>
> Q: So you're saying that Ms. Hanson was intoxicated? A: No, another female that was there.
>
> Q: Did the victim appear intoxicated that night? A: No.

Tompkins contends counsel should have objected and moved to strike as inadmissible Officer Jurgensen's testimony about the unnamed witness who stated Tompkins pushed Hanson. Although counsel could have objected and moved to strike, we are unable to conclude it was a breach of an essential duty not to do so; and if it was a breach, we conclude it was not prejudicial.

Counsel's failure to object may have been made pursuant to a reasonable trial strategy, specifically not wanting to draw undue attention or emphasis to Officer Jurgensen's unsolicited answer. Whether this strategy is good or bad, such a tactic is not so unreasonable that it amounts to ineffectiveness. *See State v. Losee*, 354 N.W.2d 239, 244 (Iowa 1984). In evaluating counsel's performance, "we keep in mind the admonition of the Supreme Court in *Strickland* that 'the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Id*. (citing *Strickland*, 466 U.S. at 690). Although our record on this direct appeal prevents us from knowing whether the failure to object was trial strategy, we do know that the officer's own testimony suggested the witness's statements were not reliable because the witness was intoxicated and uncooperative. Moreover, we view this witness's statement to the officer as merely cumulative, and its admission does not undermine our confidence in the outcome of the case. *See Schaer*, 757 N.W.2d at 638 (concluding cumulative evidence would not likely have caused a different result). Accordingly, there was no prejudice to Tompkins.

IV. Conclusion.

Tompkins' attorney clearly made a tactical decision to file the motion in limine and may have been ineffective if the motion had not been filed because of the principles determined in *Turecek*. *See State v. Tracy*, 482 N.W.2d 675, 679 (Iowa 1992). However, because the State called Hanson to the stand to testify regarding the domestic relationship, Hanson was available and subject to cross-

examination. Thus, the right to confrontation was not denied. The question of whether Tompkins' attorney should have tried to cross-examine Hanson is not at issue here although we suspect counsel did not want to open the door to the same testimony precluded by the order in limine. Because Tompkins' counsel had no duty to pursue a meritless issue by objecting to Officer Jurgensen's testimony under the Confrontation Clause, and Tompkins suffered no prejudice from counsel's failure to make a hearsay objection in reference to the unnamed witness, Tompkins did not receive ineffective assistance counsel at trial. We affirm.

AFFIRMED.

Vaitheswaran, J., concurs; Potterfield, J., concurs specially.

POTTERFIELD, J. (concurring specially)

I write separately to disagree with the majority's conclusion the record is adequate to decide whether the complaining witness was available for cross-examination. While I also would affirm Tompkins' conviction, I would preserve his ineffective-assistance claim for potential postconviction relief.

We generally preserve ineffective-assistance-of-counsel claims for postconviction-relief proceedings. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011). "Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal." *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We prefer to reserve such claims for development of the record and to allow trial counsel to defend against the charge. *Id.* If the record is inadequate to address the claim on direct appeal, we must preserve the claim for a postconviction-relief proceeding, regardless of the potential viability of the claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

I agree with the majority that the witness's statements to the police officer at the scene were testimonial. At trial, Tompkins had a right to confront the witness who made the statements. *See Schaer*, 757 N.W.2d at 636. Tompkins did not object to the officer's testimony on confrontation grounds. On direct appeal, without a postconviction record, we can only speculate why. But the majority sidesteps counsel's failure by concluding that Tompkins' right to confrontation was not implicated as the witness was available for cross-examination since she did appear at trial. That conclusion is not based on an adequate record.

While acknowledging the district court restricted the State's direct examination of the witness about her statements, the majority assumes too much in deciding there was no restriction on Tompkins' cross-examination of the witness. Because the record on direct appeal alerts us to negotiations between counsel and discussions with the court occurring off the record regarding the scope of cross-examination of the complaining witness, we do not know the extent of the court's orders. A restriction on the defense's right to cross-examine would be a limitation on the scope of examination that would "undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists." *Owens*, 484 U.S. at 561–62. I would reserve this claim for full development of the facts in postconviction proceedings.